122 FERC ¶ 61,138
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Big West Oil Company Docket Nos. OR01-2-005

v.

Frontier Pipeline Company and
Express Pipeline Partnership

Chevron Products Company Docket No. OR01-4-005

v.

Frontier Pipeline Company and
Express Pipeline Partnership

ORDER ON REHEARING AND CLARIFICATION

(Issued February 19, 2008)

1. On July 6, 2007, and July 9, 2007, Frontier Pipeline Company (Frontier) and Express Pipeline LLC (Express), respectively, filed requests for rehearing and clarification of the Order on Remand and Motion to Dismiss and Establishing Hearing issued June 7, 2007, in this proceeding.[1] Express argues that the Commission incorrectly applied its own standard in assessing whether the joint rate at issue was just and reasonable. Frontier contends that the June 7, 2007 Order is inconsistent with the opinion of the United States Court of Appeals for the District of Columbia in *Frontier Pipeline*

[1] *Big West Oil Co., et al. v. Frontier Pipeline Co., et al.*, 119 FERC ¶ 61,249 (2007) (June 7, 2007 Order).

Co. v. FERC[2] and further, that it is inconsistent with section 4(1) of the Interstate Commerce Act (ICA). Both Express and Frontier assert that the Commission should dismiss the original complaints filed in this proceeding by Big West Oil Company (Big West) and Chevron Products Company (Chevron).

2. In the alternative, Frontier seeks clarification to resolve what it contends are ambiguities regarding the hearing procedure established in the June 7, 2007 Order. Frontier and Express also question whether the examination of the joint rate should include the rate for Platte Pipeline Company (Platte), and finally, Express contends that the Commission failed to clarify whether the appropriate Express rate to be examined at the hearing will be the uncommitted rate or the 15-year term rate. As discussed below, the Commission denies rehearing and clarifies various issues relating to the hearing established by the June 7, 2007 Order.

I. Background

3. This proceeding arises from consolidated complaints filed by Big West and Chevron against Frontier and Express challenging the lawfulness of Frontier's local rates and Frontier's "portion" of certain joint rates filed by Express covering the transportation of crude oil and syncrude. In an order issued February 18, 2004, the Commission stated that the issue was "whether [the Commission] should base the calculation of the reparations on the sum of the local rates on file with the Commission or the sum of the indexed ceiling levels applicable to the local rates."[3] Citing *Texaco Pipeline, Inc.* (*Texaco*),[4] the Commission ruled that, under its joint rates policy, reparations must be calculated based on the sum of the local rates on file with the Commission rather than on the sum of the applicable ceiling levels.[5]

[2] 452 F.3d 774 (D.C. Cir. 2006) (*Frontier Pipeline*).

[3] *Big West Oil Co., et al. v. Frontier Pipeline Co., et al.*, 106 FERC ¶ 61,171, at P 9 (2004) (February 18, 2004 Order).

[4] 72 FERC ¶ 61,313 (1995).

[5] February 18, 2004 Order at P 9, 12-17.

4. In an order issued August 10, 2004, the Commission denied rehearing of the February 18, 2004 Order and affirmed the award of reparations.[6] The Commission calculated the reparations based on the local rates on file during the applicable period for three of the four segments involved in the transportation and included a reduced rate stipulated by the parties as the just and reasonable rate for the fourth segment during the relevant period.

5. Frontier and Express sought judicial review of the August 10, 2004 Order. On May 26, 2006, the Court remanded the case to the Commission for further explanation of its joint rates policy. The court required the Commission to explain whether the prior Supreme Court constructions of ICA section 1(5) found in *Louisville & Nashville Railroad Co. v. Sloss-Sheffield Steel & Iron Co.* (*Sloss-Sheffield*),[7] *Great Northern Railway Co. v. Sullivan* (*Great Northern*),[8] and *Patterson v. Louisville & Nashville Railroad Co.* (*Patterson*)[9] preclude the Commission's examination of the joint rate at issue in this case without considering the reasonableness of the rate as an aggregate.[10] The court further stated that, if these decisions do not preclude the policy applied by the Commission, the Commission must explain why its alternative approach is a reasonable construction and also must explain its deviation from the Interstate Commerce Commission's (ICC) applications of ICA section 1(5) prior to 1977, when Congress transferred jurisdiction over oil pipelines from the ICC to the Federal Energy Regulatory Commission.[11]

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[6] *Big West Oil Co., et al. v. Frontier Pipeline Co., et al.*, 108 FERC ¶ 61,183 (2004) (August 10, 2004 Order). The Commission also rejected Complainants' request for reparations applicable to shipments by third parties for which Complainants claimed to have paid the transportation charges. In remanding the case to the Commission, the court affirmed the Commission's determination on that issue.

[7] 269 U.S. 217 (1925).

[8] 294 U.S. 458 (1935).

[9] 269 U.S. 1 (1925).

[10] 452 F.3d at 788-89. The court also cited *Natn'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 162 L.Ed. 2d 820, 125 S.Ct. 2688, 2700 (2005) (*Brand X*); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-45, 81 L.Ed. 2d 694, 104 S.Ct. 2778 (1984) (*Chevron*).

[11] 452 F.3d at 789.

6. In the June 7, 2007 Order, the Commission denied Frontier's motion to dismiss the complaints (Motion to Dismiss)[12] and affirmed the Commission's policy that a joint rate is just and reasonable if it does not exceed the sum of the local rates on file with the Commission. However, the Commission established an evidentiary hearing to afford Frontier the opportunity to demonstrate that its calculation of the joint rate is reasonable and that no reparations are due. The Commission acknowledged that it must judge the reasonableness of the joint rate as an aggregate rather than considering the reasonableness of only some of the joint rate's components. The Commission further stated that this approach is consistent with the court's direction and with the ICC's pre-1977 application of ICA section 1(5).[13]

7. The Commission explained that, early in the ICC's regulation of oil pipelines, that body adopted a policy that it generally would presume a through rate to be unreasonable if it exceeded the sum of the local rates on file for service between the same points. Congress codified this policy in 1910 by amending ICA section 4, but it also amended that section to allow carriers to seek relief from either the long haul/short haul provision or the aggregate-of-the-intermediates provision upon prior application to the ICC.[14]

8. The Commission concluded that its joint rates policy and its rulings in the instant case have been consistent with the streamlined ratemaking procedure mandated by

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[12] Motion of Frontier Pipeline Company to Dismiss Reparations Complaints (July 25, 2006).

[13] June 7, 2007 Order at P 14.

[14] *Id.* P 15-16, citing to ICA Section 4(1), which provides in part as follows:

> It shall be unlawful for any common carrier subject to this chapter . . . to charge or receive any greater compensation in the aggregate . . . for a shorter than for a longer distance over the same line or route in the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates . . . *Provided*, That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances . . . and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section. . . .

49 App. U.S.C. § 4(1) (1988).

Congress in the Energy Policy Act of 1992 (EPAct),[15] and it also pointed out that its current regulations anticipate the possibility that a joint rate can exceed the sum of the underlying local rates on file. Despite the simplification of its procedures, the standards of ICA sections 1(5) [16]and 4(1) remain the foundations of oil pipeline ratemaking, and the Commission emphasized that it acted pursuant to both sections in the underlying orders in this case. The Commission reviewed its application of its joint rates policy first stated in *Texaco Pipeline, Inc*. (*Texaco*),[17] and applied in subsequent decisions. The Commission stated that it has applied its policy consistently by measuring the justness and reasonableness of a joint rate by comparing it with the sum of the underlying local rates on file with the Commission. The Commission further explained that it never has allowed joint rates to be measured against the sum of the applicable ceiling levels if the ceiling levels were higher than the actual local rates on file; however, the Commission observed that, in *Texaco*, the filed rates coincidentally were at the ceiling levels.[18]

9. The Commission stated that it also applied its joint rates policy in this case for purposes of calculating reparations.[19] Specifically, the Commission included the underlying local rates on file, with the exception of the local rate for one segment, for which it included a rate stipulated by the parties as the just and reasonable substitute for that local rate on file during the applicable period. However, the Commission established a hearing to afford Frontier the opportunity to demonstrate on a cost-of-service basis the justness and reasonableness of the joint rate it proposed to use for calculating reparations, which exceeded the sum of the applicable intermediate rates that the Commission calculated with the inclusion of the one rate stipulated by the parties for purposes of settlement.

10. The Commission cited the court's explanation of the principles reflected in *Sloss-Sheffield*, *Great Northern*, *Patterson*, and in pre-1977 ICC practice as follows: (1) a through rate that exceeds the sum of intermediate rates is presumptively unreasonable;

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[15] Pub. L. No. 102-486, § 1801(a), 106 Stat. 2776, 3010, 42 U.S.C. § 7172 note.

[16] ICA Section 1(5) states in part as follows: "All charges made for any service rendered or to be rendered in the transportation of . . . property . . . shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful." 49 App. U.S.C. § 1(5)(a) (1988).

[17] 72 FERC ¶ 61,313 (1995).

[18] June 7, 2007 at P 20.

[19] *Id*. P 21.

(2) the presumption is rebuttable, not conclusive; (3) the reference to intermediate rates is to contemporaneously filed rates; and (4) a showing that a joint rate exceeds the sum of intermediate rates shifts the burden of proof of reasonableness to the carrier to justify the excess.[20] The Commission concluded that its orders in this case embodied these principles because the parties' stipulated lower rate for one segment of the joint rate during the specified period satisfied the contemporaneity requirement and also because the hearing would satisfy the rebuttability requirement by allowing the joint rate participants to present cost-of-service evidence to rebut the presumption that a joint rate exceeding the sum of the applicable local rates (including in this case the one rate stipulated for settlement purposes) is unreasonable.

11. The Commission pointed out that its existing regulationscodify the provision of ICA section 4(1) that allows a carrier to seek relief from the limitation that a just and reasonable joint rate cannot exceed the sum of the underlying local rates.[21] In this case, however, prior to the parties' stipulation to substitute a reduced rate for one of the underlying local rates, the joint rate did not exceed the sum of the local rates on file. In other words, there was no need to seek relief from section 4 when the joint rate was filed, but the stipulated local rate for one segment during the relevant period caused the joint rate to be used in calculating reparations to become unjust and unreasonable.

II. Discussion

A. Applicable Legal Standard and the Use of the Stipulated Local Rate

12. Express asserts that the court construed *Texaco* as applying to indexed ceiling rates, not to filed local rates,[22] and faulted the Commission for failing to explain why its contrary ruling should prevail.[23] Despite this, states Express, the Commission continued to hold that a joint rate is just and reasonable if it does not exceed the sum of the individual local rates on file (and not the ceiling levels).[24] Express challenges the Commission's explanation that, when it first enunciated the joint rate policy in *Texaco*, it

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[20] *Id*. P 24.

[21] June 7, 2007 Order at P 27, citing to 18 C.F.R. § 341.15(a) and (c) (2007).

[22] Express cites *Frontier Pipeline*, 452 F.3d at 786.

[23] *Id*. at 780.

[24] Express cites June 7, 2007 Order at n.13 and P 20.

used imprecise language.[25] Express states that the Commission again claimed that the standard of reliance on filed rates was clear from its subsequent joint rate orders applying *Texaco*,[26] but Express contends that the Commission never stated that it was modifying *Texaco*, never stated that *Texaco* had imprecise language, and repeatedly cited *Texaco* as the order that articulated the joint rate policy.

13. Express asserts that the Commission's adoption of the "sum of the ceiling levels" in the *Texaco* order did not result from mere coincidence, but rather from the Commission's reasoned application of the ceiling rate system established in Order No. 561,[27] in which the Commission repeatedly declared that ceiling levels might well exceed the rates actually on file at any given time. Express states that the Commission clarified this concept as follows:

> Each pipeline will establish an annual ceiling level for each of its rates. . . of course a company is not required to charge the ceiling rate, and if it does not, it may adjust its rates upwards to the ceiling at any time during the year upon filing the requisite data, discussed below, and upon giving the appropriate notice. Since this is an annual *ceiling level*, it is not necessarily the rate which will actually be charged. . . .[28]

14. Express also contends that, under the Commission's indexing regulations, the key relevant fact for determining the reasonableness of a local rate is the ceiling level.[29] Express acknowledges that a pipeline's local rates on file and actually being charged may be below the ceiling level, and indeed that Order No. 561 anticipated that rates on file and below the ceiling levels would result from competitive forces. Thus, concludes Express, the rates below the ceiling level are irrelevant for purposes of determining whether the rate is just and reasonable.

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[25] *Id.* citing to P 20.

[26] *Id*.

[27] *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992*, (Order No. 561), FERC Stats. & Regs. ¶ 30,985, at p. 30,951 (1993), *order on reh'g*, Order No. 561-A, FERC Stats. & Regs. ¶ 31,000 (1994), *aff'd Association of Oil Pipelines v. FERC*, 83 F.3d 1424 (D.C. Cir. 1996).

[28] Order No. 561 at p. 30,953 (emphasis in original).

[29] 18 C.F.R. § 342.3 (2007).

15. Frontier contends that the June 7, 2007 Order exceeds the scope of the court's mandate because the court merely instructed the Commission to determine whether the cited Supreme Court and other precedents require the Commission to determine the reasonableness of the joint rate as a whole without focusing on a single local rate. However, argues Frontier, the court made it clear that the Commission had no choice other than to dismiss the complaints once the Commission determined that it must evaluate the joint rate as a whole.[30]

16. According to Frontier, the court repeatedly distinguished the stipulated rate from rates that actually were on file.[31] Moreover, continues Frontier, the Court rejected the Commission's approach of using a "mixed batch of rates (some contemporaneously filed, another stipulated as reasonable after the fact)" to trigger a presumption of unreasonableness.[32] Frontier maintains that the court did not regard the stipulation as establishing a lower rate than the one that was on file during the applicable period because the court repeatedly distinguished the stipulated rate from rates that were actually on file,[33] and it expressly rejected the Commission's approach of using a "mixed batch of rates" to trigger a presumption of unreasonableness.[34]

17. Similarly, Frontier asserts that the Commission erred in finding that the joint rate presumptively violated ICA section 4(1). Frontier contends that the Commission conceded in its February 18, 2004 Order in this proceeding that section 4(1)'s reference to intermediate rates refers to "local rates on file with the Commission and actually being

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[30] Frontier states that a lower court or agency "has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennsylvania R.R.*, 334 U.S. 306 (1948); *General Atomic Co. v. Felter*, 436 U.S. 493, 497 (1978); *Will v. United States*, 389 U.S. 90, 95-96 (1967); *City of Cleveland v. FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977); *United States v. Ins. Co. of N. Am.*, 131 F.3d 1037, 1041 (D.C. Cir. 1997). According to Frontier, a court's mandate encompasses "everything decided, either expressly or by necessary implication." *City of Cleveland v. FPC*, 561 F.2d 344, 348 (D.C. Cir. 1977) (internal quotations and citation omitted); *Ginett v. Computer Task Group, Inc.*, 11 F.3d 359, 360-61 (2d Cir. 1993).

[31] Frontier cites *Frontier Pipeline*, 452 F.3d at 785-86.

[32] *Id.*

[33] *Id.*

[34] *Id.*

charged for transportation."[35] According to Frontier, the Commission again acknowledged in June 7, 2007 Order that section 4(1) applies only when the lower local rates are actually and contemporaneously on file,[36] and the Commission further admitted that, in this case, "the filed joint rate initially did not exceed the sum of the local filed rates."[37] Despite that, continues Frontier, the Commission stated that the stipulation regarding Frontier's local rate "must change the way we look at what the relevant local rates were . . . ."[38]

18. Frontier cites the applicable section of the parties' stipulation:

> For the purpose of calculating the reparations, if any, that Big West and Chevron are entitled to receive for their shipments on the joint tariff, the just and reasonable rate for Frontier's local tariff for the two year period prior to the date on which the Big West and Chevron Complaints were filed until February 1, 2002 was $0.57 for light petroleum.[39]

19. According to Frontier, the Commission interpreted this language as an agreement that "the stipulated rate existed as if it were the rate on file for the past period relevant to the reparations calculation."[40] Frontier also quotes the Commission's statement that the parties had "agreed that for reparations purposes, the stipulated rate would be considered to be a local rate in effect contemporaneous with the movements at issue, and thus to be appropriately including in summing the local rates on file to determine the just and reasonable level of the joint rate."[41] However, Frontier asserts that the Commission's

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[35] Frontier cites February 18, 2004 Order at P 12.

[36] *Id.* citing to P 20. ("[T]he Commission has made it clear that the justness and reasonableness of a joint rate is measured against the sum of the underlying local rates *on file* with the Commission") (emphasis in original).

[37] *Id.* P 25.

[38] *Id.* P 26.

[39] Joint Stipulation by Complainants Big West Oil LLC and Chevron Products Company and Respondent Frontier Pipeline Company Regarding Reparations for Joint Tariff Shipments, July 18, 2002 at 7.

[40] Frontier cites June 7, 2007 Order at P 21 (italics omitted).

[41] *Id.*

interpretation is wrong, contending that the stipulation does not state that the $0.57 rate was actually on file or was deemed to have been on file during the reparations period. Frontier interprets the parties' agreement to mean that, in a cost-of-service proceeding, $0.57 would have been found to be the just and reasonable rate for Frontier's local movement during that period. Frontier also points out that the Commission recognized in the June 7, 2007 Order that "a later finding that one of the local rates applicable to the movement was unjust and unreasonable" does not "create a presumption that the joint rate was unreasonable."[42] In other words, reasons Frontier, rather than equating the just and reasonable rate with Frontier's rate on file, the parties stipulated that the just and reasonable rate was less than Frontier's actual rate on file. Frontier contends that where, as here, "the relevant terms of the stipulation are clear and unambiguous, no interpretation can vary its meaning."[43]

20. Frontier maintains that it could not have stipulated that the $0.57 rate was its actual rate on file, as this would have constituted a factual misrepresentation. Frontier speculates that the Commission was misled by its apparent conclusion that any other interpretation "would render the stipulation meaningless and a nullity."[44]

21. In Frontier's view, under the Commission's original rulings in this proceeding, the complainants would have been able to prevail simply by showing that one of the local rates should be reduced to a lower just and reasonable level, so the stipulation would have led to reparations for the complainants had they prevailed on their legal theory. Frontier asserts, however, that the complainants' legal theory was rejected by the court, and the June 7, 2007 Order did not take issue with that rejection. Frontier maintains that, under current governing legal principles, the later-substituted "just and reasonable rate" is irrelevant -- all that matters under section 4(1) is whether the lower local rate actually was on file at the time. According to Frontier, the point of its Motion to Dismiss was that the stipulation was designed to preclude reparations if its view of the law prevailed on appeal, which it did. That is why the stipulation refers to reparations "if any."[45]

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[42] *Id.* P 16.

[43] Frontier cites *Tennessee Gas Pipeline Co.*, 26 FERC ¶ 61,388, at p. 61,866 (1984).

[44] Frontier cites June 7, 2007 Order at P 21.

[45] Frontier states that it never agreed that reparations applicable to the joint rate could be calculated simply by adding up the stipulated just and reasonable rate for Frontier and the filed rates of the other carriers, nor did the court take that position. Frontier states that its consistent position has been that reparations would be owed on the joint rate only if the complainants bore their burden to show that the joint rate was

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22. **Commission Analysis**. The Commission denies rehearing on these issues of the use of the stipulated local rate and the application of the *Texaco* standard. The court required the Commission to explain why the cases cited by the court do not require the Commission to determine the justness and reasonableness of the joint rate by assessing it in the aggregate, and if the Commission finds that it is not required to address the joint rate as an aggregate, it must explain why its approach is a reasonable construction.[46] As discussed below, the Commission in the June 7, 2007 Order established a hearing process so that it can examine the reasonableness of the joint rate in the aggregate; accordingly, it has complied with the court's order and with applicable judicial and statutory standards.

23. The Commission also thoroughly explained in the June 7, 2007 Order that it properly applied the *Texaco* standard in this proceeding, as it has done in all cases subsequent to *Texaco*, and that it did not err in its conclusion that use of the one local rate *stipulated for settlement purposes* altered the measure of the presumed just and reasonable joint rate. The hearing established in the June 7, 2007 Order will allow the parties to examine the costs underlying the other underlying local segments of the joint rate to determine if they were just and reasonable. After the just and reasonable rates for the other segments are determined, they will be added to the stipulated local rate. Despite Frontier's claim to the contrary, the Commission finds that this represents the intent of the parties when they agreed to the stipulated rate. On rehearing, Frontier and Express have urged an illogical construction of the stipulation.

24. As the Commission made clear in the June 7, 2007 Order, while *Texaco* referred to the sum of the ceiling rates as the proper standard for determining the justness and reasonableness of a joint rate, the local ceiling rates in that case were by coincidence the local rates *on file* and actually offered to shippers for transportation. In its subsequent decisions applying the *Texaco* standard, the Commission unfailingly summed the local rates *on file* and actually being offered for transportation to determine whether the joint rates at issue in those proceedings were just and reasonable.[47] The Commission's

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excessive in the aggregate. Frontier maintains that the purpose of the stipulation was simply to avoid having to litigate the issue of the just and reasonable Frontier local rate in the event the Commission's sum-of-the-local rates theory was applied and upheld on appeal.

[46] *Frontier Pipeline*, 452 F.3d at 789.

[47] *Mid-America Pipeline Company, LLC*, 111 FERC ¶ 61,128, at P 23 (2005). *See also Williams Energy Services, LLC v. Mid-America Pipeline Company, LLC*, 116 FERC ¶ 61,175, at P 18 (2006); *Enbridge Energy Company, Inc*., 110 FERC ¶ 61,211, at P 54 (2005); *Express Pipeline, LLC*, 104 FERC ¶ 61,207, at P 8 (2003); *Plantation Pipe Line Co*., 98 FERC ¶ 61,219, at p. 61,866 (2002).

standard expressed in *Texaco* has never changed as Express claims. The focus of the Commission's joint rate standard was then and will continue to be the local rates *on file* and actually being offered for transportation, disregarding whether they are at the applicable ceiling levels. Local rates on file may or may not be at the ceiling levels.
25. One can envision a hypothetical joint rate situation in which some of the underlying local rates on file and being offered for transportation are at the ceiling levels, while other underlying local rates on file and being offered for transportation are below the applicable ceiling levels. The one consistent factor in such a hypothetical case is the fact that the underlying local rates are *on file* and actually being offered to shippers. Applying this consistent factor provides the most appropriate measure of the justness and reasonableness of a joint rate, absent a full cost-of-service determination, because it employs rates actually paid by the shippers rather than a ceiling level developed to simplify the ratemaking process. Although ceiling levels and filed rates equal to or lower than the applicable ceiling levels are presumed to be just and reasonable, the Commission's regulations anticipate the possibility that they may not be, so the regulations provide for challenges to rates established by means of the indexing process.[48]

26. This "on file" requirement is consistent with the filed-rate doctrine established in ICA section 6(7), which prohibits carriers from charging rates that are not on file with the Commission.[49] The court's rejection of the Commission's reliance on this section cited the provision that prohibits carriers from charging more than the rates in effect at the time of the shipment.[50] That is a correct statement of one requirement of section 6(7). However, another requirement of section 6(7) is that, no matter the level of the rates, they must be *on file* if they are to be effective and charged to shippers.

27. Likewise, the emphasis on the requirement that rates must be on file is consistent with the principles of the EPAct and Order No. 561. The EPAct required the Commission to establish a "simplified and generally applicable ratemaking methodology."[51] The Commission did so in Order No. 561, but the rate cap system

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[48] 18 C.F.R. § 343.2(c) (2007).

[49] 49 U.S.C. App. § 6(7) (1988) ("No carrier . . . shall engage . . . in the transportation of passengers or property . . . unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter . . . .").

[50] *Frontier Pipeline*, 452 F.3d at 788.

[51] Pub. L. No. 102-486, § 1801(a), 106 Stat. 2776, 3010, codified at 42 U.S.C. 7172 note.

established therein did not lessen the requirement that, no matter the ceiling applicable to a carrier's rates, it can charge only rates that are on file. Further, the Supreme Court decisions on which the court relied in this case address rates that were *on file*.[52] Even the statement in Order No. 561 cited by Express makes it clear that only the filed rates may be charged:

> Each pipeline will establish an annual ceiling level for each of its rates. . . . of course a company is not required to charge the ceiling rate, and if it does not, it may adjust its rates upwards to the ceiling at any time during the year upon filing the requisite data, discussed below, and upon giving the appropriate notice. Since this is an annual *ceiling level*, it is not necessarily the rate which will actually be charged. . . .[53]

28. Despite the consistent requirement that rates must be on file if they are to be charged to shippers, it is important to recognize that a settlement agreement among parties to a contested proceeding may establish substitutes for a pipeline's actual rates on file.[54] To hold otherwise would discourage settlements, which the Commission favors. The Commission accepts Frontier's statement that the parties agreed that, in a cost-of-

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[52] *Louisville & Nashville Railroad Co. v. Sloss-Sheffield Steel & Iron Co*., 269 U.S. 217, 231 (1925) ("[T]he rates in question were in fact constructed by combining as factors the existing *published* proportional rates of the several carriers . . . ") (emphasis supplied); *Great Northern Railway Co. v. Sullivan*, 294 U.S. 458, 461 (1935) ("Plaintiff and another complained to the [ICC] alleging the proportionals *filed* by the Great Northern and other American carriers to be unjust and unreasonable. . . .") (emphasis supplied); *Patterson v. Louisville & Nashville Railroad Co*., 269 U.S. 1, 7 (1925) ("The rates under which these shipments were made were first *established* in 1882 . . . .") (emphasis supplied).

[53] Order No. 561 at p. 30,953 (emphasis in original).

[54] *E.g*., *Trailblazer Pipeline Co*., 88 FERC ¶ 61,168 (1999). In this case, a party that was severed from contested settlement argued that the settlement rates, which were lower than filed rates, must be just and reasonable, regardless of whether they are proposed in a tariff filing or a settlement. *Id*. at 61,563, 61,565. The Commission ordered a hearing to allow the contesting party an opportunity to establish the just and reasonable level of the rates. *Id*. at 61,565. The Commission also cited Rule 602 (18 C.F. R. § 385.602 (2007)), under which it can approve an uncontested settlement upon finding that the settlement appears to be fair and reasonable and in the public interest, rather than upon a finding that the settlement rates are just and reasonable.

service proceeding, $0.57 would have been found to be the just and reasonable rate for Frontier's local movement during the period. However, this represents the will of the parties for purposes of settling the litigation, not a finding of the Commission as to a just and reasonable rate that may be charged to shippers and also not a finding that it was a filed rate actually charged to shippers. Nothing in the ICA, the Commission's regulations, or applicable precedent prevents parties to a contested proceeding from agreeing to substitute lower figures for the actual rates on file and being offered to shippers. The stipulated rate for that one segment was never filed with the Commission or charged to shippers, but only the parties to the stipulation know the give and take of the negotiations that led to agreement on the amount of that substitute rate.

29. The Commission disagrees with the statement that it is using a mixed batch of rates to determine whether the joint rate was just and reasonable. Because the ceiling levels applicable to the underlying local rates were not filed with the Commission, they were not charged to the shippers. Thus they cannot be used to determine whether the joint rate exceeded the aggregate of the local rates. All of the underlying local rates that the Commission included in its calculation of the just and reasonable joint rate were on file and actually charged to shippers during the applicable period except for the one lower stipulated rate that the parties agreed would be used only in calculating reparations. For that limited purpose, the stipulated rate did not have to be on file. There is no dispute that shippers paid a joint rate that was based in part on a local rate that was higher than the stipulated rate. The parties could well have stipulated substitute rates for the other segments at any level they desired, including at applicable ceiling levels, but they did not. Thus the Commission based its determination of the justness and reasonableness of the joint rate on the rates that were actually on file and charged to shippers for the other segments and carried out the parties' clear intent by employing the stipulated local rate for the one segment.

30. It is important to recognize that the most accurate measure of whether a pipeline's rates are just and reasonable is a full cost-of-service determination.[55] As stated above, the rate cap system established by Order No. 561 anticipates such proceedings, and the Commission's action in providing for a hearing to examine the pipelines' cost-of-service is entirely consistent with ICA section 4(1), the Commission's regulations, and the court's decision.

[55] "From the dawn of federal oil pipeline regulation in 1906 up to the 1990s, the relevant agencies decided the reasonableness of a rate mainly on the basis of the pipeline's individual costs." *Frontier Pipeline*, 452 F.3d at 776.

B. Whether to Dismiss Complaints

31. Both Express and Frontier contend that the Commission should dismiss the complaints because they failed to allege that the joint rates were unreasonable on the basis of the entire joint rate.[56] In fact, states Express, the complainants affirmatively disclaimed any challenge to Express' rates,[57] instead addressing only the actions and alleged unlawful status of Frontier's rates. Express notes that the complainants specifically stated that they named Express, the carrier that filed the joint rates, as a respondent solely to ensure that full relief would be available.

32. Further, states Express, the Commission's regulations[58] provide that the Commission's action (including any hearings or other proceedings) on a complaint will be limited to the issues raised in the complaint. In effect, argues Express, the complaints relied solely on the theory that the joint rates were unlawful because the portion of the joint rate attributable to certain carriers was unlawful or discriminatory. Express asserts that the court held that this was inconsistent with well-established case law; therefore, the Commission erred by not dismissing the complaints. Frontier states that an additional basis for dismissing the complaints is that they never asserted a violation of the "aggregate-of-intermediates" clause of section 4(1). Frontier maintains that the Commission should not only dismiss the complaints, but that it also should order repayment of the reparations.[59]

33. **Commission Analysis**. In the June 7, 2007 Order, the Commission declined to dismiss the complaints, rejecting the argument that the court vacated the Commission's previous orders in this proceeding.[60] The arguments of Express and Frontier are the same

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[56] Frontier cites Motion of Frontier Pipeline Company to Dismiss Reparations Complaints (July 25, 2006) at 18.

[57] Express states that the Motion of Frontier Pipeline Company to Dismiss Reparations Complaints (July 25, 2006) raised substantial grounds for dismissal of the complaints, which the Commission erroneously failed to grant in the June 7, 2007 Order.

[58] Express cites 18 C.F.R. § 343.4 (2007).

[59] Frontier attaches to its request for rehearing the Affidavit of Michael J. Webb, stating that it includes an exhibit showing the amount of reparations paid by Frontier together with the applicable interest accrued from the date of payment to the present time.

[60] June 7, 2007 Order at P 9.

arguments they raised unsuccessfully in 2001 in their answers to the complaints.[61] Those arguments continue to lack merit. Accordingly, the Commission will not dismiss the proceedings.

C. Clarifications

34. Both Frontier and Express maintain that the calculation of the aggregate of the intermediates in this proceeding must include the rate of Platte Pipeline Company (Platte).[62] Additionally, Express asks the Commission to clarify whether the June 7, 2007 Order changes its prior findings that the appropriate joint rates will be determined by including the local discounted term rates posted by Express rather than the undiscounted rates applicable to uncommitted volumes. Frontier and Express acknowledge that the court did not reach these issues.

35. Frontier contends that the data relating to the cost-of-service of each carrier involved in the joint movement are not within its possession. Frontier explains that the other carriers involved are all separate companies and, with the exception of Anschutz, are not affiliated with Frontier. In fact, Frontier points out that one of the carriers -- Chevron Pipe Line -- is an affiliate of one of the two complainants.

36. Frontier states that the June 7, 2007 Order is ambiguous with regard to who must make the cost-of-service filing. Frontier points out that the Commission states in

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[61] *Big West Oil Co. v. Frontier Pipeline Co.*, 94 FERC ¶ 61,339 at p. 62,258, 62,260 (2001).

[62] Platte is an affiliate of Express. Certain of its facilities are employed in the movements at issue in this case. However, the Commission ruled as follows in the February 18, 2004 Order:

> For purposes of determining reparations in this case, the issue is not whether the facilities owned by Platte were necessary for movement under the joint rate at issue here. The Commission finds that Platte is not listed as a participant on any joint tariff at issue here. Accordingly, no rate attributable to Platte may be included in the calculation of reparations due.

paragraph 30 of that order that the individual carriers must make cost-of-service filings.[63] On the other hand, continues Frontier, Ordering Paragraph (B) states that Frontier must file all supporting cost material. Moreover, Frontier claims that the order is ambiguous regarding whether Frontier must make a cost-of-service filing for its segment or instead is entitled to rely on (and to be bound by) the $0.57 stipulated rate for its segment of the joint movement.[64]

37. Frontier claims that, under a proper cost-of-service presentation, the overall costs of the joint movement substantially exceed the joint rates charged to the complainants. Frontier points to the Webb Affidavit, which relies on the Page 700 filings of the various carriers to show the cost-of-service underlying each segment of the joint movement for the applicable periods. According to Frontier, the Webb Affidavit shows that the cost-of-service of the other carriers -- when added to the stipulated $0.57 Frontier rate -- exceeds the joint rates in virtually all scenarios and all time periods.[65] However, Frontier asserts that, to make the kind of cost-of-service presentation called for in the June 7, 2007 Order, it would need access to internal data from the other carriers that it does not currently possess and cannot obtain within the June 7, 2007 Order's 60-day deadline. Thus, assuming the Commission does not overturn its finding of a section 4(1) violation for the reasons given above, Frontier requests clarification of the hearing procedure as follows:

1. Whether Frontier itself needs to make a cost-of-service filing for its portion of the joint movement or is entitled to rely on (and is bound by) the $0.57 stipulated rate;

2. Whether each of the other carriers is required to make an independent cost-of-service filing for its segment of the joint movement, or whether that burden falls solely on Frontier;

February 18, 2004 Order at P 23 and n.24 (citing 49 U.S.C. app. § 6(4) (1988): "The names of the several carriers which are parties to any joint tariff shall be specified therein. . . .")

[63] Frontier cites June 7, 2007 Order at P 30 ("This will require all individual participating pipelines to file cost, revenue and throughput data pursuant to the Commission's Opinion No. 154-B cost-of-service methodology for determining oil pipeline rates.").

[64] Frontier cites June 7, 2007 Order at P 30 (requiring "all" participating pipelines to file cost and revenue data).

[65] Frontier cites Request for Rehearing, or in the Alternative Clarification, of Frontier Pipeline Company (July 6, 2007) Webb Affidavit, Attachment 1, at ¶ 21.

3. Whether Frontier has discharged whatever burden it may have through the Page 700 analysis provided in the Webb Affidavit; and

4. Whether Frontier will have a further opportunity after such clarification is provided to elect whether to pursue the hearing alternative.

38. **Commission Analysis**. As Frontier and Express acknowledge, the court did not reach the questions of the use of the Platte rate or the use of discounted rates in determining reparations.[66] Accordingly, the Commission's prior rulings on these two issues remain controlling.

39. Nevertheless, the Commission grants Frontier clarification of the following hearing procedures.[67]

40. Frontier asks whether it must file cost-of-service data supporting the stipulated rate or whether it may rely on the stipulated rate. Consistent with the discussion above, the Commission will give effect to the parties' stipulation with regard to this one rate and will not require Frontier to supply cost-of-service data supporting it. Frontier must file cost-of-service data to support a rate higher than the stipulated rate.

41. In response to the second clarification requested by Frontier, the Commission clarifies that each carrier must provide cost-of-service data relevant to its individual local rate underlying the joint rate. However, because Frontier is the carrier asserting the right to a hearing to establish a just and reasonable joint rate on a cost-of-service basis, Frontier bears the burden of developing an arrangement with the other pipelines to provide the evidence that will be required for the hearing.

42. Mr. Webb's affidavit answers Frontier's question concerning whether it has discharged its burden. It states in part as follows:

> Frontier does not suggest that the rates derived from Page 700 represent precisely the rates that would result from a fully litigated proceeding. A number of issues would likely arise that could change these rates. . . . The

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[66] *Frontier Pipeline*, 452 F.3d at 789.

[67] The hearing process was suspended pending Commission action on the requests for rehearing of the June 7, 2007 Order. Order of Chief Judge Canceling Prehearing Conference and Suspending Track III Procedural Timelines, Docket Nos. OR01-2-004 and OR01-4-004 (July 23, 2007).

> purpose of the Exhibits discussed above is not to provide the Commission with the information it would need to prescribe a just and reasonable rate, but rather to show that it is highly plausible that, if the rates were fully litigated on a cost of service basis, Frontier would be shown to owe no joint rate reparations at all (or at most only a minimal amount).[68]

Frontier has stated that it does not have access to the cost-of-service data of all the joint carriers. Accordingly, Frontier and the other joint carriers must file complete cost-of-service data consistent with the requirements of the Opinion No. 154-B methodology and Part 346 of the Commission's regulations.

43. Within 30 days of the date of issuance of this order, Frontier must notify the Commission whether it elects to seek a cost-of service determination as described in the June 7, 2007 Order.

The Commission orders:

(A) Rehearing of the June 7, 2007 Order is denied, as discussed in the body of the order.

(B) Clarification of the June 7, 2007 Order is granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[68] Request for Rehearing or in the Alternative Clarification, of Frontier Pipeline Company (July 6, 2007) Attachment 1 at 9.